

April 23, 2015

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Date: 2015.07.17 12:45:38 -04'00'

Re: MUR 6916

Dear Mr. Jordan:

We write as counsel to Obama for America ("OFA") and Martin Nesbitt in his official capacity as Treasurer ("Respondents"), in response to the complaint filed by the Foundation for Accountability and Civic Trust on February 16 (the "Complaint"). The Complaint fails to set forth sufficient facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act") or Commission rules. Accordingly, the Complaint should be dismissed and the Commission should close the file.

Legal Analysis

"The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."¹ Additionally, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true.² The complaint fails to meet this standard and, therefore, must be dismissed.

First, the Complaint alleges that Catalist made in-kind contributions to Respondents by charging them less than the normal and usual charge for its services. This claim is purely speculative and without basis. Catalist did not serve as a contractor to Respondents between 2010 and the present.³ And, though Respondents did retain NGP VAN, LLC, the Complaint does not allege that NGP VAN provided services at less than the normal and usual cost, nor does it provide any facts that would support such a contention.⁴

¹ Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, MUR 4960 (Dec. 21, 2000).

² *Id.*

³ According to the disclosure reports filed with the Commission, Respondents did not reported making disbursements to Catalist between 2010 and the present. See www.fec.gov. Though the Complaint fails to specify when, precisely, the violations alleged therein would have occurred, this response only addresses activity that occurred from 2010 to the present, as claims accruing more than five years ago are barred by the statute of limitations. 28 U.S.C. § 2462.

⁴ See Complaint at 24-25.

Second, the Complaint alleges that Catalist served as a "common vendor" that made available Respondents' "client lists and voter data files" to unspecified outside groups. Accordingly, the Complaint alleges, these unspecified outside groups may have made unspecified coordinated communications that should have been treated as in-kind contributions to Respondents.

Under Commission rules, to constitute a "coordinated communication," a public communication must meet three prongs. First, it must be paid for by a person other than the candidate, authorized committee or political party committee with which it is coordinated. Second, it must satisfy one or more content standards. Third, it must satisfy one of several conduct standards.⁵

The Complaint fails to allege specific facts to support a finding that any one of these prongs has been met. It does not point to a single specific communication that was paid for by a third party group. Nor does it identify the content of any such communication, or even when such a communication may have been distributed.

Moreover, the Complaint does not allege any specific facts to show that the conduct prong was met. As described above, Catalist did not serve as a contractor to Respondents between 2010 and the present, so Catalist could not have served as a "common vendor" to Respondents.

The complaint also makes the vague and unsourced allegation that Catalist and NGP VAN have "joined forces," leading to the sharing of information in violation of the coordination rules.⁶ While Respondents did retain NGP VAN, the Complaint still fails to allege any specific facts with respect to NGP VAN that would trigger the conduct prong of the coordination rules. Merely sharing the same vendor is not a violation of the Act, nor does it create a presumption of coordination.⁷ Instead, a vendor is a "common vendor" under the rules only if the vendor's "usual and normal business includes the creation, production, or distribution of communications"⁸ and "the same vendor creates or distributes the ad alleged to be coordinated and, within 120 days, has provided specified services for the candidate alleged to have benefitted from the coordination."⁹ Furthermore, the vendor must have used material nonpublic information about the candidate or party committee's plans, projects, activities or needs, or information used previously in providing services to the candidate or party committee, in creating, producing or distributing the ad, or conveyed such information to the person paying for the communication.¹⁰

⁵ 11 C.F.R. § 109.21(a)

⁶ Complaint at 26.

⁷ See *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

⁸ *Id.* at 436.

⁹ First General Counsel's Report, MUR 6077, at 7 (Apr. 20, 2009); 11 C.F.R. § 109.21(d)(4).

¹⁰ See 11 C.F.R. § 109.21(d)(4)(iii).

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The Complaint does not allege that any of these criteria have been met. It fails to allege any specific facts that show that NGP VAN created or distributed communications for outside groups, that show the actual transfer of information from Respondents to those outside groups, or that show that such information was material to any communication made by an outside group. Without such facts, the Commission may not find reason to believe.¹¹

Lastly, even if the Complaint alleged that Catalist or NGP VAN used or conveyed Respondents' nonpublic information, it would still not allege a violation by Respondents. Under the rules, if a common vendor uses such information to create, produce, or disseminate a communication paid for by a third party, or conveys such information to the third party, the third party will have *made* an in-kind contribution in the form of a coordinated communication.¹² But a candidate's committee does not *receive* an in-kind contribution unless it requests or suggests that the third party make the communication, is materially involved in decisions regarding the communication, or has substantial discussions with the third party in which it disclosed nonpublic and material information about its plans, projects, activities or needs.¹³ The Complaint does not allege that any of these other conduct standards have been met, nor does it allege any facts that would support such a conclusion. Accordingly, the Complaint must be dismissed.

Conclusion

The Complaint fails to allege specific facts that constitute a violation of the Act or Commission regulations. For the reasons described herein, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,



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Graham M. Wilson
Andrew H. Werbrock
Counsel to Respondents

¹¹ See, e.g., First General Counsel's Report, MUR 6570 (Oct. 22, 2012) (declining to pursue enforcement where there were no "allegations of specific conduct" that a common vendor used or conveyed nonpublic campaign information); First General Counsel's Report, MUR 6077, at 7.

¹² 11 C.F.R. §§ 109.21(c)(4).

¹³ *Id.* §§ 109.21(b)(2), 109.37(a)(3).